

New Hampshire Department of Revenue Administration

Fiscal Note Quick Guide

12-2869.0

SB 293-FN, *relative to notice requirements and payment of interest by the department of revenue administration for overpayments and underpayments of tax.*

Senate Ways & Means Committee

This bill relates to notice requirements and payment of interest by the Department of Revenue Administration (DRA) for overpayments and underpayments of tax. The assumptions, methods used to determine the fiscal impact, estimated fiscal impacts and other comments are different for the various sections of the bill. As such, similar sections are grouped together in the analysis and the analyses may differ between sections.

Overpayment Interest Rate – Section 1

This section of the bill would make the overpayment rate, or the interest paid on refunds issued by the DRA, equal to the underpayment rate, or the interest rate paid by taxpayers for taxes not paid in full by the due date. Currently the overpayment rate is three percentage points less than the underpayment rate, where the underpayment rate is equal to the rate specified in Section 6621(a)(2) of the Internal Revenue Code of 1986 as in effect on the September 1 immediately preceding the calendar year plus two percentage points.

For calendar year 2010, calendar year 2011 and calendar year 2012 the overpayment rate is 3% and the underpayment rate is 6%. Thus, the overpayment rate for FY2011 is 3% and the underpayment rate for FY2011 is 6%.

In order to estimate the fiscal impact of the overpayment rate equaling the underpayment rate, FY2011 interest paid on overpayments (refunds) was used. For refunds paid in FY2011, \$709,127.60 was paid in interest at a rate of 3%. If the interest rate was increased to 6% the amount paid on refunds would be double, or \$1,418,255.20. The resulting fiscal impact would be \$709,127.60.

This law would take effect on July 1, 2012, or the start of FY2013. Given that currently the interest rates are only set through the first half of FY2013, FY2013 was the only year for which a fiscal impact was estimated. For years beyond FY2013 a fiscal impact cannot be determined.

This section could be administered by the DRA without any additional cost that could not be absorbed in our current budget.

Notice of Overpayment or Underpayment – Sections 2 and 4

These sections state that the DRA shall give notice of any overpayment or underpayment, along with an explanation in cases of an underpayment of the basis for the underpayment, interest and penalties, within 30 days of the date the tax payment is made by the taxpayer. Overpayments and underpayments are the result of various scenarios including a payment that does not equal the amount states in a document, calculation errors when determining tax liability, and the result of an audit.

Section 2 does not define what the “notice” of overpayment or underpayment must contain. Based on Section 4, however, it appears that it is intended that the notice contain the amount of an underpayment given that detail must be provided.

These sections do not define how the overpayment and underpayment is determined. Therefore, the DRA assumes that the DRA has 30 days from the date of a payment to conclude that any type of overpayment or underpayment occurred and, in the case of an underpayment, provide an explanation for the underpayment, penalties and interest.

As written, these sections would only allow 30 days from the date of payment for the DRA to notify a taxpayer of any overpayment or underpayment, including an explanation in the case of an underpayment. This would effectively eliminate almost all audit activity by the DRA because it is virtually impossible to complete an audit within 30 days from the date of payment. Thus, the fiscal impact would be equal to the audit revenue. Audit revenue, during the past three fiscal years (FY2009, FY2010 and FY2011), has averaged \$45,000,000. As a result of the passages of the FY2013 budget, Audit staff has been reduced by 39%.

As a practical matter the DRA could not administer this law if passed. For example, with estimate and extension payments there is no way to know if an overpayment or underpayment occurred without a return being filed, and this will not occur within 30 days. Also, a determination of overpayment or underpayment in the case of an audit can take longer than 30 days give the audit process of requesting documents from a taxpayer, meeting with a taxpayer and thoroughly analyzing the information received. While it is difficult to complete this process within 30 days from initial contact to any notice of overpayment or underpayment, it is impossible to complete this process within 30 days of payment.

In order to administer these sections the DRA would need to incur significant additional costs for computer system upgrades and IT development, along with hiring additional employees to do tax system maintenance and validation. Moreover, no matter how many auditors the DRA has, the current process of estimate and extensions payments, final returns, and communication with the taxpayer during an audit could not be conducted within 30 days.

The DRA notes that there are multiple technical or mechanical defects in the sections related to the notice of overpayment or underpayment:

- Section 2 states that the DRA shall give notice of any overpayment or underpayment within 30 days of the date of the tax payment, but what the “notice” needs to contain is

not specified. It is unclear whether the notice has to contain the amount of the overpayment or underpayment, or if the notice can just state that an overpayment or underpayment has occurred. Section 4 requires that an explanation of an underpayment be provided within 30 days of the payment, which seems to mean that the notice must contain the amount.

- Section 2 states that the DRA shall give notice of any overpayment within 30 days of the date of the tax payment; however, this is not consistent with RSA 21-J:28 I, which states that the DRA has 3 months to pay a refund without interest. It is not clear how giving notice of a refund would be different than issuing a refund.
- Section 2 states that the DRA shall give notice of any overpayment or underpayment within 30 days of the date the tax payment is made. It is unclear, however, what overpayment and underpayment circumstances require a notice. For example, if the notice is required for all overpayments and underpayments, in the case of estimate and extension payments, overpayment or underpayment cannot be determined until the return is filed, which will not occur within 30 days of the payment.

Hearing Notice of Decision – Section 3

This section states that the DRA shall, within 60 days of a hearing, issue a notice of decision affirming, increasing or decreasing the tax.

This section requires issue of a notice of decision, or Final Order, within 60 days of the hearing. The end of the hearing, however, is not the same as “the close of the record.” Following a hearing, in some cases, the taxpayer is given up to 60 days to provide additional documents to support their case, at which point the record closes and a Final Order is issued. By requiring a Final Order within 60 days of “the hearing,” the taxpayer loses the opportunity to provide any additional information that may have been requested at the hearing to support their case. The language should be clarified as to whether the timeframe is 60 days from “the hearing” or 60 days from “the close of the record.” For our analysis the DRA assumed that it was intended that the timeframe be 60 days from “the close of the record.”

During FY2010 the time required to produce a Final Order after “the close of the record” averaged 55 days. There were, however, five complex cases where the Final Order was issued more than six months after the close of the record. If the 53 Final Orders issued during FY2010, 17 were produced after 60 days.

During FY2011 the time required to produce a Final Order after the close of the record averaged 19 days. There was, however, one complex case in which the Final Order was issued more than six months after the close of the record. Of the 91 Final Orders issued during FY2011, 6 were produced after 60 days. It should be noted that the average number of days to produce a Final Order during FY2011 was affected by an increased number of cases dismissed by a Final Order for the taxpayer’s failure to appear. Final Orders dismissing a case for failure to appear are generally issued on the same day or the day after a hearing.

In order to ensure that Final Orders are issued within 60 days after the close of the record and to maintain the same level of review and analysis that currently exists, the DRA would need to hire two additional Hearing Officers to keep the current timing for the scheduling of hearings. An estimated cost for two additional Hearing Officers can be made based upon the salary schedule of the current Hearing Officer. Without additional resources (continuing operating with one Hearing Officer), the timing for the scheduling of hearings would be significantly increased to ensure compliance with this new law. The Hearing Officer would require more days in which to write Final Orders.

The fiscal impact of requiring a Final Order within 60 days of a hearing is based on two scenarios. The first scenario would be to hire two additional Hearing Officers to ensure that Final Orders would be issued within 60 days based on the current timing for the scheduling of hearings. Assuming that each Hearing Officer would be paid within the DD group of the Unclassified Salaries then the salary would be between \$55,912 and \$70,199, plus average benefits for DRA employees within that group of \$35,000; the total cost for each Hearing Officer would be between \$90,900 and \$105,200. Two Hearing Officers would cost the Department between \$181,800 and \$210,400, for an average of \$196,000.

The second scenario of a fiscal impact would be to continue with one Hearing Officer, but increase the timing for the scheduling of hearings. Under this scenario for instances where the Final Order determines that additional tax is due, those taxpayers may have to pay higher amounts in interest than with the current timing for the scheduling of hearings since interest is calculated back to when the tax was due. The additional amount of revenue to be received under this scenario cannot be calculated as there is no way to estimate how much additional tax will be due and how many additional days of interest will need to be paid.

Taxpayer Information Statement – Section 5

This section states that Taxpayer Information Statements shall be distributed by the DRA to a taxpayer within 30 days of the date the taxpayer is first contacted by the DRA for an examination of the taxpayer's records, an assessment or a demand for payment. The Taxpayer Information Statements are currently distributed to the taxpayer within 30 days of contact for examination, assessment or demand of payment. With respect to assessments, the Taxpayer Information Statement is printed on the base of all tax notices issued by the DRA.

This section could be administered by the DRA at no additional cost and there is no fiscal impact associated with this section.

CONCLUSION

The total estimated fiscal impact of all five sections is shown below:

	<u>FY2013</u>	<u>FY2014</u>	<u>FY2015</u>	<u>FY2016</u>
<u>Revenue Losses</u>				
Section 1 (Overpayment Rate)	\$ 700,000			
Sections 2, 4 (Notices)	\$ 44,000,000	\$ 44,000,000	\$ 44,000,000	\$ 44,000,000
<u>Expenditures</u>				
Section 4 (Hearings)	\$ 196,000	\$ 196,000	\$ 196,000	\$ 196,000
Net	\$ 44,896,000	\$ 44,196,000	\$ 44,196,000	\$ 44,196,000

As a practical matter, whether the intent of the drafter(s) or not, this bill bars the DRA's responsibility to ensure compliance with New Hampshire's tax law by all taxpayers.

This law would take effect July 1, 2012.